

IN THE  
**UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

KATHRYN STRUETT, formerly  
KATHRYN SMITH,  
*Appellant,*  
*vs.*  
HARRY B. HILL,  
*Appellee.*

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**SPECIAL APPEARANCE OF APPELLEE  
TO MOTION FOR RULE TO  
SHOW CAUSE**

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HARRISON B. ALLEN,  
*Attorneys for Harry B. Hill,  
Appellee, appearing here  
Specially only.*

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WM. P. LORD, of Portland, Oregon,  
*Solicitor for Appellant.*

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NO.

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Comes now Harry B. Hill, Appellee, and appearing here specially only and preserving at all times his special appearance, demurs to the so-called motion for rule to show cause on behalf of the appellant, and objects to this Honorable Court issuing the order therein prayed, for the following reasons:

I.

It appears from the record that this Honorable Court is without jurisdiction.

## II.

No effort was made to present for settlement a statement or bill of exceptions until more than six months after the entry of final decreee. There was no extension of time for settling bill of exceptions, and the Honorable Trial Court had lost all jurisdiction when said bill was presented, and this Honorable Court is therefore without jurisdiction.

## III.

In the preface to the printed rules of this Circuit at page 8 is the following:

“The principal object sought to be accomplished is two-fold: to furnish, so far as possible, a complete code of practice covering all cases not provided for by statute or by rules of the Supreme Court, *and to conform the practice in equity cases* to that in cases at law, so far as permitted by the statutes and the equity rules of the Supreme Court.”

Rule 75 provides that a bill of exceptions may be made during the trial, or within such time as the Court or Judge may allow, by order made *at the time of the ruling*. It then provides:

“If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows: The party desiring the bill shall, *within ten days* after the ruling is made, or if such ruling was made during a trial then ten days after the rendition of the verdict, or if the case was tried without a jury within ten days after written notice of the rendition of the decision, serve upon the ad-

verse party a draft of the proposed bill of exceptions."

Rule 81 provides how and when extensions of time may be had, and is in part as follows:

"When an act to be done in any action at law or *suit in equity* which may at any time be pending in this court relates to the pleadings in the cause or \* \* \* the *preparation of bills of exceptions* or amendments thereto \* \* \* be extended by the Court or Judge by order *made before the expiration of such time.*"

The time for appeal expires within six months.

Appellant in this case made no bill of exceptions at the trial, made none within ten days, made no application for an extension of within ten days, made no such application within the six months allowed for an appeal. We submit:

1. That appellant having asked for no extension of time within the ten days, the Court lost all jurisdiction to extend time.
2. But if we should be mistaken in this, appellant not having asked for an extension within the six months appeal period, the Trial Court certainly lost all jurisdiction to either settle the bill or to extend time.

We believe, aside from the rule of this court, the authorities are practically unanimous to the effect that where the full time within which an act may be performed has expired, such time may not then be extended. The extension must be within the limitation originally fixed.

There is an utter lack of showing of diligence. The case was decided October 29th. Final decree was entered November 20th. April 20th, exactly five months after decree and six months after the case was decided, counsel for appellant wrote a letter to the stenographer (see printed motion, page 9) asking the stenographer to transcribe the evidence in the cause. During this entire five or six months no effort whatever was made to prepare bill of exceptions. The stenographer, on receiving the letter of counsel, wrote him that he was not making the transcript because the time for appeal had expired (see printed motion, page 9).

The six months for appeal expired on May 20th, yet counsel made no effort after the time the stenographer advised him that his time for appeal had expired, to procure any extension of time for making bill of exceptions. On May 29th, nine days after the six months had expired for appeal, he requested Mr. Roberts, of counsel for appellee, to stipulate that instead of the statement of the evidence the questions and answers might be used. This Mr. Roberts refused, notifying him that his time for appeal had expired (printed motion, page 10).

Appellant made no move nor application to have a bill of exceptions settled in the cause until the 10th day of June, 1920 (printed motion, page 4). This was twenty days beyond the six months' appeal period before any effort whatever was made to present a bill of exceptions to the Court for settlement.

Counsel has at no time asked for an extension of time to make a bill of exceptions. Counsel in the mo-

tion says the Court denied it because the bill had not been prepared within ten days, but we presented to the Honorable Trial Court, as we are presenting here, the further question that it had neither been prepared nor presented within six months, and that no extension had even been asked.

Counsel in the motion prints on pages 7 and 8 two orders, but these orders were never signed by the Honorable Trial Court. They are merely forms of orders which he prepared. In the motion, page 8, it is stated that these orders were presented to Mr. Roberts prior to the 18th day of May, 1920, and that Mr. Roberts refused to approve them.

Counsel applied to the Trial Court for an extension of time in which to file his record in this court (printed motion, page 6), but that application included nothing in relation to a bill of exceptions, and was not and is not contended to have been an application for an extension of time for making and serving a bill of exceptions.

We submit, therefore, that the Honorable Trial Court was, on the 10th day of June, 1920, without any right, power or jurisdiction to settle a bill of exceptions, and was right in refusing so to do, and that he should not now be harrassed by being required to show cause in this court as prayed in the motion of appellant.

Most respectfully submitted,

JOHN W. ROBERTS,  
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*Attorneys for Harry B. Hill,  
Appellee, appearing here  
Specially only.*

